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# Participation in Courts and Tribunals: Concepts, Realities and Aspirations

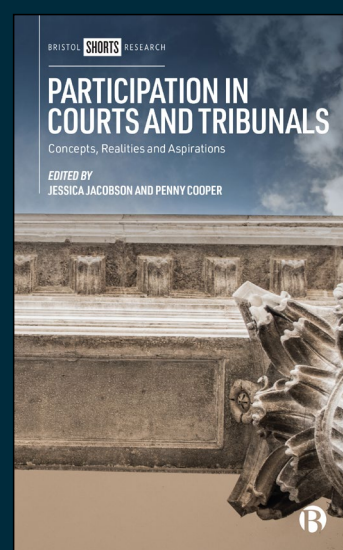
## SUMMARY

**It is a long-established legal principle in England and Wales that people should be able to participate effectively in the court and tribunal proceedings that directly concern them. However, the concept of participation is poorly defined in law and under-explored in legal research and analysis.**

*Participation in Courts and Tribunals* presents the findings of a unique, cross-jurisdictional study which addressed the pressing, but hitherto neglected, questions of what exactly it means to participate in judicial proceedings, why participation matters, and what factors impede and, conversely, support participation.

The study combined a review of national and international policy with empirical research in the form of interviews with justice practitioners and observations of court and tribunal hearings. It examined the meanings and functions of participation in a wide range of contexts: as applied, for example, to defendants in the criminal courts, parties in family proceedings, respondents and claimants in the Employment Tribunal, appellants in immigration and asylum hearings, and witnesses in all such settings.

The research findings have generated a provisional framework – [Ten Points of Participation](#) – for understanding the principle of effective participation and for supporting participation in practice. These endeavours are all the more important at a time of continuing policy reform and technological innovation – including, not least, change arising from the COVID-19 pandemic. The framework presented here should help to ensure that the participation of all court users is at the heart of permanent court reform.



*Participation in Courts and Tribunals: Concepts, Realities and Aspirations* edited by Jessica Jacobson and Penny Cooper is published by Bristol University Press, September 2020.

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## KEY MESSAGES

- The legal principle that laypeople should be able to **participate effectively** in court and tribunal hearings is expressed in statute, case law, procedure rules, practice directions and guidance. Participation is widely regarded by judges, lawyers, court officials and others as essential to the delivery of justice. But despite the significance of effective participation as a principle in English law, the concept tends to be poorly defined and, to date, has been subject to little critical analysis or empirical investigation.
- A raft of policy initiatives over the past two decades have sought to bolster participation in judicial proceedings, and particularly that of individuals deemed 'vulnerable'. Other developments have arguably undermined participation. These include reduced availability of publicly funded legal representation, and wide-scale court closures and the accompanying growing dependence on remote participation through live video or audio link and online processes.
- As of summer 2020, the COVID-19 pandemic has accelerated the existing trend towards replacement of physical with virtual court attendance. The long-term implications of changes arising from the public health emergency are not yet known. But these developments make all the more urgent the need to consider what 'participation' means, why it matters, and what can be done to ensure it is genuinely effective for court users across all judicial settings.
- Judges, lawyers, court staff and other practitioners interviewed for this study made clear their commitment to the principle of effective participation. They regarded participation not simply as an abstract concept, but as something they actively mediated and facilitated in their differing professional capacities. Courtroom observations confirmed that practitioners do, by and large, make sincere efforts to help court users to participate; and that, moreover, they treat court users with courtesy, respect and kindness.
- And yet the observations also revealed the profound limits to participation by individuals whose powerlessness was laid bare in the courtroom. At the heart of almost every observed case was a story of conflict, loss and disadvantage which was told to the court. Moreover, proceedings involved not just the **telling** but also the **translation** of these stories into legal questions and legal answers. This process tended to underline the disparities between the social world of the courtroom and the social worlds of most court users, who were thereby silenced and marginalised.
- The research findings point to the multi-faceted nature of participation by lay court users in judicial proceedings. Participation variously entails any or all of: providing and eliciting information for the court; being informed; being legally represented; being protected; being managed; and being present at the hearing. The functions of participation can be understood in terms of: the exercise of legal rights; enabling court decision-making; legitimisation of court proceedings; and the potential generation of therapeutic benefits for the court user.
- On the basis of these contrasting ideas of what it means to participate and why it matters, the [Ten Points of Participation](#) is proposed as a framework to guide and inform future policy, practice and research.





## JUSTICE PRACTITIONERS' VIEWS ON PARTICIPATION

Interviews with a total of 159 justice practitioners explored their understandings of the principle of 'effective participation' in judicial proceedings, and their views on whether and why it is important and how it can best be supported.

Respondents worked in various court and tribunal settings; primarily, the criminal and family courts, and employment and immigration and asylum tribunals. They included judges, lawyers, court staff, and representatives of statutory and non-statutory services.

Respondents across all jurisdictions and roles deemed participation by court users to be a core component of justice, and something they actively sought to mediate and facilitate as part of their day-to-day professional duties. In speaking of participation, they did not draw on established, ready-made definitions of the term, but articulated its meaning and value in many different but overlapping ways.

### Views on what participation entails:

- **Informing and/or eliciting information for the court**

*They've got to be able to express themselves, I mean, they've got to be able to say what they want to say in a court setting. They've got to know what ... they should be saying and what documents they ... should be producing. [judge; immigration]*

*Well, to be able to participate, really, you need to be well enough to read documents, take it all in, work out how to structure your arguments and take part in asking questions of witnesses, work out who to call as witnesses and which documents to ask for. [judge; employment]*

- **Being informed**

*The most important part of effective participation is having an understanding. That's having an understanding of the case that's against them. Having an understanding of what everybody is saying about them and what the whole trial process is. [intermediary; criminal]*

- **Being represented**

*[Court users] have to tell me their story. And, it is my job to make sure they can. ... It's much easier if they've got legal representation. [judge; immigration]*

*Without the benefit of having a legal advocate, I see parents floundering in court proceedings, not understanding the very basics of even attending at court. [Cafcass officer; family]*

- **Being protected**

*I had a gentleman that was elderly and hard of hearing, so again, I would have addressed that with the solicitors, who then raised it with the bench, who then accepted that the individual wouldn't have to stay standing and made sure that things were fully explained during that process. [liaison and diversion worker; criminal]*

- **Being 'managed'**

*I think it's then more about how lay people are handled. For instance, to be told in advance that they should answer the questions put to them, and even though they might have other things that they know, to be told that [these things] aren't necessarily relevant, would help. [magistrate; criminal]*

- **Being present**

*[If] they're not present at the hearing, they don't participate effectively .... [solicitor; family] In fact, you participate by turning up. [barrister; immigration]*

## Views on why participation matters

- **Participation is the exercise of one's legal rights**

*[Participation] is a fundamental principle of our justice, isn't it? ... I think that any person who is facing a crime has their absolute right to be heard and participate in that hearing. [legal advisor; criminal]*

*[Participation] is essential, absolutely essential. It goes to the basic tenet of justice must be seen to be done. If you're made aware that someone doesn't have the ability to follow the proceedings, whether it be because they don't speak the language, whether they have some disability, whether they have a lack of ability to concentrate on matters or understand matters, then all those factors need to be taken into consideration in order to ensure that they have a fair trial. [judge; family]*

- **Participation enables decision-making by the court**

*The question, I suppose, you pose to yourself, as a judge, in any particular case is: What's going to help these parties give their best evidence so that you can reach the best decision and they can leave more confident that what they've experienced is justice? [judge; employment]*

*As the professionals ... we want to hear what they've got to say. We want them to give their best evidence. Particularly with family cases, we want to make sure that we've got all of the available information, so that the right decisions are being made in relation to the child who's at the centre of it. [legal advisor; family]*

- **Participation legitimates court processes and outcomes**

*I think participation means being able to participate in every sense of the word and feel that you've had the opportunity to do that as well. ... Everybody needs to ... feel that they've been listened to. That's the fairness of it. [solicitor; family]*

*Issues like equal treatment should be as important if not more important, frankly, than getting it right, because that really deals with how, when somebody leaves the courtroom, they should feel that they've had a fair hearing. There should be no doubt in their mind that everything they wanted to say has been said. [judge; immigration]*

- **Participation offers potential therapeutic benefits for the court user**

*For the complainant it's a step towards feeling, 'I'm in charge on this occasion. I've been able to do it.' ... Especially if they've been the subject [of] sexual abuse, it gives them some closure, it gives them a sense of empowerment. [judge; criminal]*

## OBSERVING PARTICIPATION

Researchers conducted more than 300 hours of observations in the criminal courts (both Crown and magistrates'), Family Court, Employment Tribunal and First-tier Tribunal (Immigration and Asylum Chamber).

The nature of court user participation in the observed hearings necessarily varied by jurisdiction, type of hearing, and the court user's role or legal status. Nevertheless, there were many commonalities to participation which cross-cut the jurisdictional and other divides. Most notably, almost every case had at its heart **a story of conflict, loss and disadvantage**; and each court user's 'participation' was, in effect, a process by which they told, or had told on their behalf, their own version of that story – usually with sympathetic and kindly support of the professionals and practitioners in the courtroom.

However, judicial proceedings did not simply entail the **telling** of court users' stories, but also their **translation into legal questions and legal answers**; and, in this process, the individuals were often silenced and marginalised.

## Telling stories of conflict, loss and disadvantage

At a preliminary hearing in the **Employment Tribunal**, the judge argued that judicial mediation “behind kind, closed doors” – a form of alternative dispute resolution – was the best option for addressing a claim of race discrimination. Both sides agreed to this, but not before the unrepresented claimant, a Polish national, insistently set out his case: “I want someone like you to listen to my story about what happened; I want them to apologise; I want justice.” He described his former employment as a garage technician in which, he said, he had been subjected to racist comments, accusations that his Polish qualification was fake, and other poor treatment – after several months of which he quit the job.

At the final hearing in care proceedings in the **Family Court**, a mother’s health problems, including schizophrenia, were discussed. The judge commented on the “delightful” nature of the child who was the subject of proceedings; this, the judge said, was a credit to the mother. The mother cried when asked if she had anything further to say, and said that she was not a “100 per cent” good mother. The judge gently said that no mother is 100 per cent good.

“Don’t worry about that: we’re taking it from square one,” an **Employment Tribunal** judge told an unrepresented claimant who had apologetically said he had never been in a court before.

A defendant pleaded guilty in a **magistrates’ court** to having breached her community order. A long-term heroin user, she was said by her solicitor to have a chaotic lifestyle: she was living in a hostel, appeared to be continuing to use heroin having dropped out of drug treatment, and had recently broken her foot. She had three children, of whom the eldest was about to be adopted. In the dock, the defendant admitted to having breached her order, and gave a thumbs up to her partner – who was sitting, anxious and restless, in the public gallery. A sentence of 28 days’ custody was passed for her “wilful refusal to comply” with the order. As she was escorted from the dock, she shouted: “Do I do half?” Her partner replied: “You’ll be out in 14,” and the two blew kisses to each other.

## Translation and disempowerment

In the **Family Court**, magistrates considered a (represented) father’s application for contact with his young daughter at the same time as the mother’s application for a non-molestation order against the father. The magistrate requested a Scott Schedule (setting out the issues under dispute), and the mother’s lawyer responded: “Ma’am, I think that’s a sensible way forward – I can see the logic in your reasoning.” The father interrupted: “A what? Sorry – can I talk?” The magistrate said to him: “Well, you’ve got your representative.” The magistrate granted the mother’s request for a non-molestation order, and asked about dates for a new hearing to consider the contact application. The father put his head in hands and said: “Just leave it. I’m not going to bother any more.”

At a pre-trial hearing in the **Crown Court**, a defendant appeared from prison by video-link and noisily demanded: “Where’s the TV, where’s the jury? It’s all a load of shit, innit ... I’m just stating the facts, d’you know what I mean?” The judge lost patience and threatened to turn off the sound feed. The defendant thereafter sat quietly for the rest of the hearing, just saying “OK, thank you,” at the end.

In an **asylum hearing**, an Iraqi Kurd appealed a Home Office decision to refuse his protection claim. In the small courtroom, the appellant (through an interpreter) answered questions about his lack of contact with family in Iraq and whether and how he might access identity documents from the Iraqi authorities. He described his hand-to-mouth existence in the UK, dependent on charity from a friend and the local Kurdish community. The judge said he was reserving his decision, and that the appellant would receive it in two weeks. The appellant asked if he could speak but was told by the judge to go through his lawyer. As the participants gathered their papers and prepared to leave the courtroom, the appellant anxiously pressed into his lawyer’s hands a bundle of photocopied news reports about the deaths of people returned to Iraq. Both the lawyer and judge told him that these were not relevant to his case.

## INTERNATIONAL EXAMPLES

The study included an international review of initiatives aimed at supporting the participation of young or otherwise vulnerable court users. The review found that there has been widespread cross-fertilisation of ideas between jurisdictions, but this has tended to be ad hoc and uncoordinated. Most initiatives are under-researched, narrow in scope, and are temporary 'fixes' rather than systemic efforts to reform court culture.

The review identified an array of initiatives based around six main themes.

### **1. Witness intermediaries**

In South Africa the intermediary role was established for child witnesses in 1992, with the aim of reducing trauma associated with giving evidence. The intermediary accompanies the child witness in the video link room, translating and relaying questions into child-appropriate language. In Norway, the intermediary is a specialist forensic interviewer who interviews child witnesses while observed by the judge and counsel from an adjoining room via video-link or one-way glass.

### **2. Ground rules hearings**

Ground rules hearings are a judicial case management tool for setting the parameters for the treatment of a witness or party at a hearing so that they may participate effectively. The practice originated in England and Wales when a hearing was requested by witness intermediaries. They are now an established feature of the English legal system in cases where court users are deemed vulnerable, and feature in the criminal justice systems in Scotland and three Australian states.

### **3. Court facility dogs**

Court facility dogs are specially trained to accompany and support witnesses while they give evidence. The first recorded instance of such provision was in the US state of Mississippi in the early 1990s. It has since spread to most of the United States: the Courthouse Facility Dogs Foundation found that as of November 2019, 234 facility dogs were working in 40 of the 50 states. Court facility dog schemes are also in existence in Canada, Chile, Australia, Belgium, France and Italy.

### **4. Pre-recorded witness testimony in full**

Of the 'special measures' for vulnerable and intimidated witnesses in criminal courts in England and Wales, introduced by the Youth Justice and Criminal Evidence Act 1999, provision for pre-recorded cross-examination was the last to be implemented. Piloting began only in 2014, and national roll-out is not yet complete. In Australia, in contrast, pre-recording of child witness evidence in its entirety has long been commonplace in most states.

### **5. Specialist hearing centres**

Specialist hearing suites provide calming environments for vulnerable parties or witnesses. For example, the Glasgow Evidence and Hearings Suite opened in November 2019, designed for vulnerable witnesses to give evidence remotely, away from the formality of a traditional court room. The suite includes a calming 'sensory room' with special furnishings. Children's courts in several parts of India have facilities and waiting areas for children, equipped with toys and books.

### **6. Judicial guidance**

Judicial guidance on supporting participation varies widely in length and specificity – covering, for example, 'reasonable accommodations for people with disabilities' (Colorado Judicial Department, USA); 'gender equality' (Judicial Education Institute for Trinidad and Tobago); and 'recording evidence of vulnerable witnesses' (Delhi High Court, India).



## RECOMMENDATIONS

- For hundreds of years, the traditional approach to hearings in England and Wales has been one in which participants are co-located and communicate face-to-face. Exceptions have been made for those who are distressed, young, incapacitated or unable to attend court. At the time of writing, an existing trend towards replacement of physical with virtual court attendance has been accelerated by the COVID-19 pandemic and the imperative to maintain social distancing.
- Research shows that traditional hearings can be marginalising and disempowering for court users. However, remote hearings, if poorly configured, can retain the old barriers to participation (such as the complexities of courtroom language and processes) and add new ones (such as problems with connectivity and making oneself heard and understood over video).
- Internationally, innovative ideas to promote participation have been shared, imported and adapted. However, these initiatives have been relatively slow to take root in new jurisdictions and remain under-researched, niche, ad hoc 'fixes'. There is an urgent need for:
  - Engagement with court users to explore their perspectives on what it means to participate;
  - Co-ordinated, international, cross-jurisdictional information-sharing about barriers to, and means of supporting, court user participation;
  - New, creative approaches to court hearings that do not simply entail use of remote technologies to replicate traditional formats;
  - Research into the new approaches, including thorough, systematic evaluations.
- Case law, policy and practitioner guidance, whilst referring to the principle of effective participation, are largely silent on the forms that participation should take or its functions. This study now offers a framework, **Ten Points of Participation**, for understanding and supporting participation.
- The authors of *Participation in Courts and Tribunals* call on justice practitioners, policy-makers and academics to use and further develop this framework. It should guide engagement with witnesses and parties so that they might be better informed about what to expect in court and what is expected of them. It should also form the basis of much-needed research involving court users.
- Whatever direction future court reform takes, there is a need for greater understanding of 'effective participation'. It is the responsibility of researchers, policy-makers, the senior judiciary and others who work in courts and tribunals to place the participation of *all* court users at the centre of the process of reform.

## TEN POINTS OF PARTICIPATION

Participation by the court user **entails** any or all of:

1. providing and/or eliciting information for the court
2. being informed about proceedings
3. being legally represented
4. protection of well-being
5. being 'managed', so as to avoid disruption to proceedings
6. presence at the hearing

Participation **matters** because it:

7. is the court user's exercise of legal rights
8. enables decision-making by the court
9. legitimates court processes and outcomes
10. offers potential therapeutic benefits for the court user



## ABOUT THE BOOK

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Effective participation in court and tribunal hearings is regarded as essential to justice, yet many barriers limit the capacity of defendants, parties and witnesses to participate.

Featuring policy analysis, courtroom observations and practitioners' voices, this significant study reveals how participation is supported in the courts and tribunals of England and Wales. Including reflections on changes to the justice system as a result of the COVID-19 pandemic, it also details the socio-structural, environmental, procedural, cultural and personal factors which constrain participation.

This is an invaluable resource that makes a compelling case for a principled, explicit commitment to supporting participation across the justice system of England and Wales and beyond.

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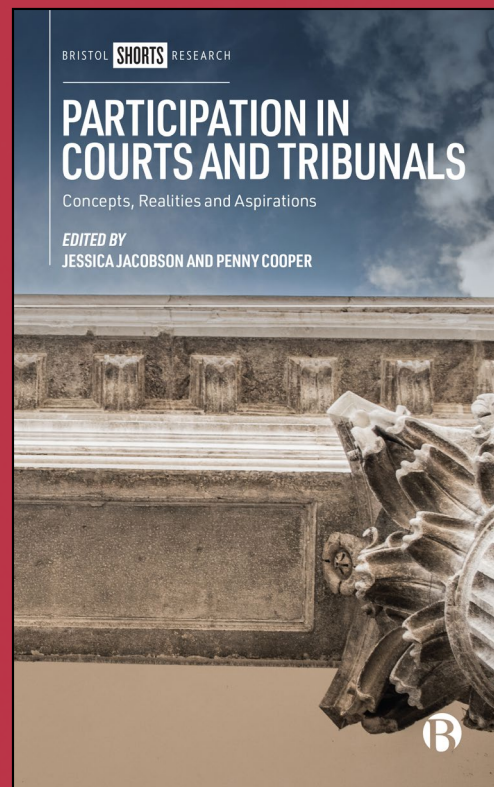
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